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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

ARTHUR E. POSTEL,

Petitioner,

VS.

THE TEXAS WATER DEVELOPMENT BOARD,
THE ATTORNEY GENERAL OF TEXAS, AND
THE STATE OF TEXAS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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61 pp

QUESTION PRESENTED

Can the federal courts grant relief under the Guaranty Clause[1] for injuries derived from the abrogation[2] of the Texas Constitution?

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[1] The Guaranty Clause provides, "The United States shall guarantee to every State in this Union a Republican Form of Government." U.S. Const. Art. IV, Sec. 4, Cl. 1.

[2] The anomaly of constitutional abrogation and its absence as judicial precedent are addressed herein at pages 13-15.

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PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Your Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on March 31, 1987, rehearing en banc and panel rehearing denied on April 27, 1987.

OPINIONS BELOW

The United States District Court for the Western District of Texas, San Antonio Division, filed its unpublished Order of Dismissal on August 27, 1986 which is reprinted in Appendix A.

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit, which affirmed the judgment of the District Court, was filed March 31, 1987, and is reprinted in Appendix B.

The unpublished order of the United States Court of Appeals for the Fifth Circuit, which denied rehearing en banc and panel rehearing, was filed April 27, 1987, and is reprinted in Appendix C. The judgment was issued as the mandate on May 7, 1987, and is reprinted in Appendix D. The order which denied recall of the mandate was filed on June 22, 1987, and is reprinted in Appendix E.

GROUNDS FOR JURISDICTION

The Judgment sought to be reviewed was entered by the United States Court of Appeals for the Fifth Circuit on March 31, 1987, and is unpublished but reprinted in Appendix B. Petitioner's timely Suggestion of En Banc Consideration was denied on April 27, 1987, and this Petition for a Writ of Certiorari was filed within ninety (90) days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Article IV, Section 4, Clause 1:

"The United States shall guarantee to every State in this Union a Republican Form of Government".

STATEMENT OF THE CASE

Petitioner brought suit for damages for injuries derived from Respondents' abrogation of the Constitution of the State of Texas and consequent subversion and erosion of its republican form of government, and for the necessary judicial remedy to arrest this continued violation of Petitioner's right to a state government that functions as its Constitution and republican form require. The basis for federal jurisdiction in the court of first instance was 28 U.S.C. Sections 1331, 2201, 2202; H.C.R. No. 106 of the 65th Texas Legislature, which granted Petitioner consent to sue; and the United States Const., Art. IV, Sec. 4, cl. 1.

The facts material to the consideration of the question presented are those that evidence the abrogation of the Texas Constitution from which Petitioner's injuries were derived. Since "In a review of

the district court's dismissal of a complaint for failure to state a claim, the allegations in the complaint must be taken as true." (Opinion below, Appendix B-6), only citations to the Complaint (Original Record 639-803) will be given herein and not those to the other record parts.

In the field of water development finance by the State, Respondents are diverting funds by abrogating provisions of the Texas Constitution, functioning outside its limits, and deceptively selling Texas Water Development Bonds as if provisions for their payment were as prescribed by the Texas Constitution (See Appendix A-2).

I CONSTITUTIONAL ABROGATION BY DIVERSION OF FUNDS

The repayment clause of Art. III, Sec. 49-c, adopted Nov. 5, 1957, is being abrogated by the diversion of prepayments of principal for financial assistance to the

purpose of further financial assistance rather than to the retirement of TWD bonds as constitutionally required. This diversion of funds was then sanctioned by the Attorney General on Sept. 23, 1980 in his Opinion No. MW-246, and then by H.B. 1349 which amended Texas Water Code Sec. 17.077 to accommodate this opinion and the diversion of funds (O.R. 642-643,658,660,661, 674,675,678bis-679bis,686-690,704,706-713bis).

The repayment clause would have been removed from the Texas Constitution if the voters had adopted S.J.R. No. 49 as a constitutional amendment on November 2, 1976. Thus, what could not be achieved by constitutional amendment has been accomplished by constitutional abrogation (O.R. 642, 643,658,673bis,678bis-679bis,680bis,704).

This diversion of funds tends to increase advances from general revenue to pay TWD bonds as had induced Petitioner to

oppose constitutional amendments to his injury by official actions of the State. Voters were assured, as did the State Auditor, that this call on general revenue would be repayed (O.R. 641,644,646,648,651 652,654,657,658,659,673bis,676,676bis,715, 732,738bis,777).

II CONSTITUTIONAL ABROGATION OF REIMBURSEMENT TO GENERAL FUND FOR ADVANCES TO PAY TWD BONDS

Sec. 49-d-1-(d) of Art. III was part of H.J.R. No. 99 adopted as a constitutional amendment on November 2, 1976, and then used by the Texas Water Development Board (TWDB) to convert the TWD Fund from a self-liquidating fund to a permanent fund. However, the identical constitutional section had first been adopted on May 18, 1971 without having attributed to it either the power to effect such a conversion or to abrogate reimbursement of the General Fund advances which had been

used to pay TWD bonds (O.R. 642,652,658, 659,677bis,678,679,679bis,684-685bis,715).

Despite audit statements between the "two adoptions" of 49-d-1-(d) that these advances would be reimbursed, the TWDB used the "second adoption" of 49-d-1-(d) to abrogate this reimbursement to the General Fund. These advances to pay TWD bonds now total $62,755,464.42 (O.R. 642,654,657 658-660,683-685bis,715).

III CORRUPT FINANCING OF TITUS COUNTY RESERVOIR ON BIG CYPRESS CREEK WAS USED TO MALIGN PETITIONER

Big Cypress Creek, an interstate stream, originates just west of Franklin County, Texas, and flows east-southeast through Franklin County Reservoir, Titus County Reservoir, Lake O' The Pines, and into Caddo Lake on the border with Louisiana. The proposed but conditional funding of the Titus County Reservoir, which now backs water onto the Franklin Dam, was

used by the TWDB to malign Petitioner and exclude him from its public affairs because he expressed opposition to proposed Texas constitutional amendments (See Appendix B-2). This opposition had been induced by, inter alia, the annual advances from the General Fund to pay TWD bonds (O. R. 640,641,643,645-648,650,732,735-736bis)

These General Fund advances helped to finance the Titus County Reservoir to the primary benefit of the Texas Utilities Co. (See Appendix B-4). These state tax funds were used not only to the primary benefit of a private company, but the corruption which attended the financing of this reservoir was, in effect, invited by the TWDB (O.R. 641,643,645,657,659,667,695-700bis, 701bis,773).

IV DECEPTIVE SALE OF TEXAS WATER DEVELOPMENT BONDS

. By quoting the Bond Resolutions in the Official Statements for the sale of

TWD bonds, it is officially portrayed that money for their payment is obtained, inter alia, from "repayment of principal for financial assistance" as the Texas Constitution requires (O.R. 643,664,667,675,681-682bis,701,738bis-739).

As established above, however, prepayments of political subdivision bonds are diverted from their constitutional purpose by Respondent TWDB, and this constitutional abrogation is sanctioned by statute law and by an opinion of Respondent Attorney General of Texas (pp. 5,6).

V EXTRACONSTITUTIONAL FUNDING BY THE TWDB

H.J.R. No. 6, 67th Texas Legislature, First Called Session, 1981, proposed a constitutional amendment that would have added Section 24 to Article VIII of the Texas Constitution, and H.B. No. 8 was enacted as its enabling legislation by the proposed addition of Chapter 15 to the

Texas Water Code. However, on November 3, 1981, H.J.R. No. 6 failed of adoption as a constitutional amendment. Consequently, there is no Article VIII, Section 24 in the Constitution of the State of Texas (O.R. 662,690bis-691).

Respondent TWDB then authorized a request for an Attorney General's opinion on the constitutionality of H.B. No. 8, but then rescinded this authorization when its General Counsel presented his Discussion of the Constitutionality of H.B. 8 which rationalized the severability of H.B. 8's "independent" sections from the section admittedly "held" invalid by the defeat of H.J.R. No. 6. However, those "independent" sections, which became Chapter 15 Texas Water Assistance Program, cited Art. VIII, Sec. 24(b) of the Texas Constitution in Sections 15.004 and 15.012 of Chapter 15, Texas Water Code. Thereafter, Respondent TWDB managed the Water Assistance Fund un-

der the "authority" of a nonexistent constitutional section (O.R. 662-663,691bis-694bis,701,717-727).

On November 5, 1985, after this suit was filed, the voters adopted Article III, Sec. 49-d-3 which endowed Chapter 15 with constitutional authorization. The "repayment clause" of Sec. 49-c did not change.

VI CONGRESSIONAL AND EXECUTIVE INACTION

Between November 3, 1981 and November 5, 1985, neither Congress nor the Executive Branch of the Federal Government took any action whatsoever under the Guaranty Clause to curb the financial activities of the TWDB outside the limits of the Texas Constitution whereby the republican form of government of the State of Texas was being subverted.

Also, Congress & the Executive Branch have taken no action whatsoever under the Guaranty Clause to curb the abrogation of

the Texas Constitution as outlined above under Parts I through IV whereby the republican form of government of the State of Texas is being subverted as Petitioner opposed to his injury.

REASONS FOR GRANTING THE WRIT

A writ of certiorari should be granted to answer the Question Presented. The decision of the United States Court of Appeals for the Fifth Circuit did not address this important question of federal law which, for two centuries, has not been, but should be, settled by this Court.

A. THE ABROGATION OF A WRITTEN CONSTITUTION HAS NO PRECEDENT

Since the year 1754, the abrogation of a written constitution has never been an issue in a legal action whose opinion was published. The digests report their contents as cases dealing with the "establishment, adoption, amendment, and abroga-

tion of written constitutions", but the latter is not to be found in the cases digested.[3] The 1956 Edition of Corpus Juris Secundum, Volume Sixteen, Constitutional Law contains the identical report of its contents on page one, but makes no reference to the abrogation of a written constitution in the body of the work. The 1984 Edition avoids any reference to the abrogation of a written constitution[4] as if such abrogation could not occur.

Theoretically, the abrogation of a written state constitution can not occur in the United States because such official nullification without adoption, amendment, or revision would be outside that which the voters had adopted and approved as the

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[3] 5 U.S. Supreme Court Digest, 1,14-16; 16 Federal Digest (1754-1940) 294,305-309; 10 Modern Federal Practice Digest, 1,14-16; 11A Federal Practice Digest 2d, 1,28-33; 15 Federal Practice Digest 3d, 454,482-84;

[4] 16 Corpus Juris Secundum, Constitutional Law, 1984 Edition, 22-62.

foundation of their republican form of state government. Such governmental actions would be arbitrary and outside constitutional law -- in a word, outlaw government. However, this Petition is not based on theortical considerations. The abrogation of constitutional provisions, inter alia, are the very means by which Respondents finance water projects; and, thereby, in the field of water development finance by the State of Texas, its republican form of government is being subverted, and Petitioner, as an individualized victim of this subversion, has stated a claim upon which relief can be granted.

As will be shown, this relief can be granted under the Guaranty Clause by dispelling the myth that this Court has imposed upon itself the inability to uphold our form of state government under the Guaranty Clause.

B. NONJUSTICIABILITY OF ALL CLAIMS UNDER THE GUARANTY CLAUSE IS A JUDICIAL MYTH

In the formation and ratification of the United States Constitution, Rhode Island was unique among the original thirteen colonies. It was the only one without a delegate to the 1787 Constitutional Convention, it was the last to ratify the Constitution, over a year after Washington had been in office, and then by a vote of but 34 to 32 in the longest of the ratifying conventions, and it was the only State without its own adopted constitution.[5]

Rhode Island continued to govern itself under the 1663 Charter granted by the Stuart King Charles II. The Charter's limited franchise and the fractious political climate in the State led to fifty years of

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[5] Francis N. Thorpe, The Constitutional History of the United States 1765 - 1895 (Chicago 1901), Vol. I, p. 284, Vol. II, pp. 191,197-198; Luther v. Borden, 48 U.S. (7 How.) 1 at 35.

contention which culminated in two constitutional conventions, two constitutions, two state governments and the "Dorr War" of 1842 to settle the matter.[6]

The case which has virtually immobilized the Founding Fathers' carefully crafted guarantee of republican government to the States arose out of this political contest in the State least amenable to the United States Constitution.

Luther v. Borden, 48 U.S. (7 How.) 1 (1849) grew out of an incident under martial law during this "war" in Rhode Island. Agents of the charter government broke into the home of an insurgent. He brought a trespass action, and the agents defended by claiming they had acted under state authority. The plaintiff countered that the state government was illegal. This Court

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[6] Arthur M. Mowry, The Dorr War or The Constitutional Struggle In Rhode Island (Providence 1901).

rejected that argument stating that under the U.S. Const. Art. IV, Sec. 4, "it rests with Congress to decide what government is the established one in a state." Id. @ 42. The "political question" doctrine of non-justiciability is considered to have its origin in Luther, but it is apparent that the remedy sought and denied in Luther is not the same as the right to a republican form of state government under the Guaranty Clause of the U.S. Constitution.

The case from which derives the current judicial determination of what constitutes a political question is Baker v. Carr, 369 U.S. 186. Each of the opinions below relies on Baker to support their two dominant considerations, 1) that "Guaranty Clause claims involve those elements which define a 'political question', and for that reason and no other, they are nonjusticiable.", and 2) that the "Guaranty Clause is not a repository of judicially manageable

standards which a court could utilize independently in order to identify a State's lawful government" Baker, 369 U.S. at 218, 223 (Appendix A-4,3 and B-6,7).

Petitioner seeks protection of his constitutional right to a republican form of state government in Texas that functions within the limits of its Constitution and thereby as its republican form requires. It would be irrelevant to the Question Presented to construe this constitutional right as a political right because "a political right does not mean it (the suit) presents a political question." Baker, 369 U.S. at 209. Political questions are those that have rendered the justiciability of claims under the Guaranty Clause "foreclosed by our decision of cases involving that clause." Ibid. (Emphasis supplied). As will be shown, it is the cases decided under that clause which presented "political questions" that are

nonjusticiable rather than any inherent quality of the clause itself which foreclosed justiciability, and it is equally true that this "case determinative" consideration also governed the manageable standards test for justiciability under the Guaranty Clause.

The Court's "review of a number of political question cases . .

> . . . reveals that in the Guaranty Clause cases and in the other 'political question' cases, it is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States which gives rise to the 'political question'." Id., 369 U.S. at 210, and

> "Much confusion results from the capacity of the 'political question' label to obscure the need for case-by-case inquiry." Id., 369 U.S. at 210-211 (Emphasis supplied).

This Court then examined representative cases of the political question doctrine in various categories, and from these cases were derived six formulations

to describe a political question. Id., 369 U.S. at 211-217. It cannot be shown that any of the formulations so derived "is inextricable from the case at bar, (so) there should be no dismissal for nonjusticiability on the ground of a political question's presence." Id., 369 U.S. at 217.

However, following this analysis, this Court proposed to consider "with special care" Id., at 218 the category of cases concerning the Guaranty Clause, and predicted that

> "We shall discover that Guaranty Clause claims involve those elements which define a 'political question,' and for that reason and no other, they are nonjusticiable." Id., 369 U.S. at 218.

Lifted from this prognosis was the first "dominant consideration" (See p. 18) quoted by the District Court and paraphrased by the Court of Appeals to support their dismissal and affirmation of the case at bar. However, the complete quota-

tion and its context show clearly that it was the cases considered with special care which led to the discovery that their Guaranty Clause claims involved political questions, and it was not shown, nor held, that the clause itself had an intrinsic nonjusticiable political question bias. Furthermore, in reviewing the Guaranty Clause cases and other cases, this Court did "not explore their implications in other contexts" than the apportionment case before it. Id., at 210.

The Guaranty Clause case first considered in Baker, 369 U.S. at 218, was Luther v. Borden, 7 How. 1. The second "dominant consideration" (p. 18) in the opinions below was quoted from Baker as the holding in Luther applicable to the apportionment question in Baker, i.e.

> "(T)he Guaranty Clause is not a repository of judicially manageable standards which a court could utilize independently in order to identify a State's law-

ful government." Id., 369 U.S. at 223.

Petitioner avers that in the case at bar there is no need to identify which is the lawful state government in Texas as "identify" is used in Luther and in Baker, at 223 and at 222. To pose such a need, begs the question fairly included in the Question Presented, i.e. whether or not the government of the State of Texas functions within the limits of its Constitution and, thereby, within the limits of, and in accord with, its republican form.

C. PETITIONER'S CLAIM OF CONSTITUTIONAL ABROGATION IS CLEARLY DISTINGUISHED FROM PREVIOUS GUARANTY CLAUSE CLAIMS

Following Luther, the Guaranty Clause cases considered in Baker, 369 U.S. @ 223-224. concerned the claims that a contested election deprived voters of a republican government, Taylor & Marshall v. Beckham, 178 U.S. 548 (1900); claim that republican government was negated, Pacific States Tel.

Co. v. Oregon, 223 U.S. 118 (1912); claim that republican government was negated, Kiernan v. Portland, 223 U.S. 151 (1912); claim that republican government was negated, Marshall v. Dye, 231 U.S. 250; claim that republican government was negated, O'Neill v. Leamer, 239 U.S. 244; claim that republican government was negated, Ohio ex rel. Davis v. Hildebrant, 241 U.S. 565 (1916); claim that republican government was violated by workmen's compensation, Mountain Timber Co. v. Washington, 243 U.S. 219; claim that republican government was negated, Ohio ex rel. Bryant v. Akron Metropolitan Park District, 281 U.S. 74 (1930); and claim that republican government was violated by delegation to agency of power to control milk prices, Highland Farms Dairy v. Agnew, 300 U.S. 608 (1937).

These cases have no precedential value for the suit at bar. It does not claim

that republican government was negated as do six of these nine cases. Two of these claim that republican government was violated by workmen's compensation or by an agency's control of milk prices, but they do not claim that this was done by the abrogation of constitutional provisions in the State's Constitution, or that these functions were carried out after they were specifically defeated as amendments to the State's Constitution in uncontested elections, or that they were implemented outside the limits of the State's Constitution. These are the claims in the suit at bar (pp. 5-12 supra), and they are clearly distinguished from those cited in Baker.

The first case cited above claimed that the voters had been deprived of republican government because of the manner in which a contested election for governor had been resolved in Kentucky. It had been resolved by the State's Legislature and

its courts as provided by its Constitution and laws, and the federal courts refused to review their determinations. It was not claimed that the constitutional provisions by which the election had been resolved had been defeated by the voters as in the case at bar (p. 6 supra). It was not claimed that these provisions of its Constitution had been abrogated and the abrogation sanctioned by the State's Attorney General (pp. 5-7). It was not claimed that the applicable laws were those that incorporated constitutional provisions that did not exist (pp. 10-12). All of these claims are present in the instant case. The case at bar is clearly distinguished from Taylor & Marshall v. Beckham and from the other cases cited in Baker.[7]

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[7] It should be noted that the Baker treatment of the Guaranty Clause issue of law was reasoned from an ex parte presentation and not from an adversarial presentation of the issue "upon which the court so largely depends for illumination of diffi-

D. UNDER THE GUARANTY CLAUSE, STATE CONSTITUTIONAL ABROGATION TRANSCENDS ANY SIMILITUDE WITH THE RATIONAL-BASIS TEST OR PER SE ANALYSIS FOR FEDERAL CONSTITUTIONALITY UNDER THE DUE PROCESS AND EQUAL PROTECTION CLAUSES.

As was shown above (pp. 5-12 and 15), the abrogation of state constitutional provisions, inter alia, are the very means by which Respondents finance water projects. In Stern v. Tarrant County Hospital District, 778 F.2d 1052 (U.S. Cert. denied 1986), the United States Court of Appeals for the Fifth Circuit reaffirmed en banc

> ". . . the settled constitutional rule that state agencies may pursue legitimate purposes by any means having a conceivable rational relationship to those purposes. A decision that passes constitutional muster under the rational-basis test does not violate the equal protection clause simply because it violates a state anti-discrimination statute." Id. at 1054 (Emphasis supplied).

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cult constitutional questions" Id. at 204. The issue of Guaranty Clause justiciability was neither asserted nor argued by appellants -- only advanced as an in terrorem argument by appellees.

Although the wisdom of centralizing the finance of water development with the State is questionable (O.R. 731bis-732)., such a purpose is legitimate when authorized by the Texas Constitution. However, the means by which the purpose is pursued cannot pass constitutional muster under the Guaranty Clause if those means abrogate the Texas Constitution no matter how rational those means may be in pursuit of the legitimate purpose, because the abrogation of a State's Constitution subverts its Republican Form of government which is, per se, a violation of the Guaranty Clause.

But in Stern at 1056, a per se analysis of constitutionality was rejected by holding that:

> "The guarantees of the fourteenth amendment . . are guarantees that turn on federal constitutional standards of equality and rationality rather than on state standards. Converting alleged viola-

> tions of state law into federal equal protection and due process claims improperly bootstraps state law into the Constitution."

However, state constitutional abrogation is fundamentally different from violations of state law, and is particularly so when violations of the Guaranty Clause are involved as opposed to the guarantees of the fourteenth amendment "that turn on federal constitutional standards". Ibid.

E. UNIVERSAL CONSTITUTIONAL STANDARD OF A REPUBLICAN FORM OF STATE GOVERNMENT

The cases cited in Baker were those in which this Court has since Luther "refused to resort to the Guaranty Clause -- which alone had been invoked for the purpose -- as the source of a constitutional standard for invalidating state action." Baker, 369 U.S. at 223. However, the standards of a republican form of state government in the United States certainly

include a written constitution as the foundation of that governmental form. Since this is not a state standard but a universal standard in the United States, the abrogation of a written state constitution, the distinguishing feature of the suit at bar, is, per se, a violation of the Guaranty Clause that does not involve the conversion or bootstrap of state law into the Constitution of the United States.

F. COORDINATE BRANCHES OF FEDERAL GOVERNMENT NEITHER CONCERN THEMSELVES WITH THE ISSUE AT BAR NOR LEND THEMSELVES TO ITS RESOLUTION

As shown above (pp. 12-13), Congress and the Executive Branch of the Federal Government have taken no action under the Guaranty Clause to curb the abrogation of the Texas Constitution, so "the relationship between the judiciary and the coordinate branches of the Federal Government" Baker at 210 (See p. 20 supra) would be unaffected by judicial action in the suit

at bar. Thus with standards (E. supra) the political barriers fall away, and rightly so, because the coordinate branches of the Federal Government will neither concern themselves with the issue at bar nor lend themselves to its resolution.

G. RESTORATION OF CONSTITUTIONAL FIDELITY AND RELIEF CAN BE DONE BY LAW AND WITHOUT DIFFICULTY

After remand on the narrow issue of the Question Presented and a hearing on the merits, the Federal District Court can grant relief and mandate the allocation of public funds to the state water accounts in accord with the provisions of the Texas Constitution. This can be done by law and without difficulty because the merits of Petitioner's cause of action are a synthesis of his injuries and the specific misallocation of public funds by constitutional abrogation from which these injuries were derived.

H. HIATUS IN FEDERAL RESPONSIBILITY UNDER THE GUARANTY CLAUSE

This Court in Texas v. White, 74 U.S. 700,727-9 held that it is "the obligation of the United States" and "the duty of the United States" to guarantee a republican form of government to the people of Texas. As noted (E. supra), a written constitution is the foundation of a state's republican form of government, and "Congress has conditioned the entry of virtually every state since the original 13 on its approval of the state's constitution." Hanson v. Town of Flower Mound, 679 F.2d 497 at 503 (5th Cir. 1982).

However, such federal review does not apply to amendments of the Texas Constitution except those which involve changes in election procedures, 42 U.S.C. 1973. Consequently, neither Congress nor the Executive Branch review the substance of other constitutional amendments to guarantee

that the government of the State of Texas remains republican in form. Nor do they review the procedures of the State for compliance with its Constitution and thereby with its republican form of government. Without procedural review by the federal courts, there remains a gap in the federal responsibility to meet the obligation and duty of the United States under the Guaranty Clause.

This hiatus in federal responsibility permeates the records as a dearth of legal actions that address the aborgation of written state constitutions (A. supra). Such abrogation results from the arbitrary acts of state government (I-V supra). By the exercise of procedural review for compliance with the Texas Constitution, the Federal District Court can remedy these arbitrary acts (See G. supra) and fulfill the responsibility of the United States under the Guaranty Clause.

I. THE JUDICIAL APPLICATION OF THE GUARANTY CLAUSE AS THE MEANS FOR RELIEF IN ACCORD WITH MADISON'S PURPOSE

James Madison wrote that "Wherever there is an interest and power to do wrong, wrong will generally be done,"[8] The abrogation of Texas constitutional provisions is a wrongful act that serves the interests of the "water faction" and its bureaucracy in state government. For most, the significance of these provisions remains obscure, but for this minority faction, such abrogation avoids constitutional limitations on its interests. A year earlier, Madison, writing about the as yet unratified United States Constitution, stated:

> "If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by

---

[8] Letter to Thomas Jefferson dated October 17, 1788, Jefferson Papers, Volume 14, Julian Boyd, Editor, p. 19.

regular vote. . . under
the forms of the Constitution."[9]

However, the obscure significance of the abrogated constitutional provisions and the rise in the pervasive control by the bureaucracy since Madison's time have left the executive and legislative branches without the knowledge or inclination to supply relief. Furthermore, the water faction is centered in the Austin capitol community, so it is beyond reason to expect that relief could be supplied by a state court (See O.R. 679 n. 20 and text appertaining thereto in the Complaint). In the final analysis, it is, indeed, only the federal judiciary from which relief can be supplied by the republican principle of constitutional fidelity under that form of the Constitution by which every State in this Union is guaranteed a republican form of government.

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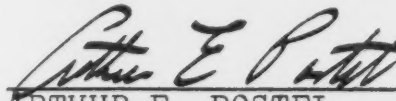
[9] The Federalists Papers, No. 10.

CONCLUSION

The abrogation of the Texas Constitution, which at this point "must be taken as true" (B-6 infra), is a wrongful act that violates the Guaranty Clause. But the Guaranty Clause is more than that which can be violated. It is a call to action by the United States, and the action called for by state constitutional abrogation is the action of the federal judiciary. The other branches of the Federal Government cannot respond adequately.

WHEREFORE, PREMISES CONSIDERED, your Petitioner prays that a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,



ARTHUR E. POSTEL
Petitioner Pro se
8011 North New Braunfels
San Antonio, Texas 78209
(512) 826-5772

AFFIDAVIT OF SERVICE

The State of Texas §
§
County of Bexar §

Before me, the undersigned Notary Public in and for Bexar County, Texas, on this day personally appeared ARTHUR E. POSTEL, who being by me duly sworn, upon oath stated: I, ARTHUR E. POSTEL, am the Petitioner herein, and on the 17th day of July, 1987, I served copies of the foregoing Petition for Writ of Certiorari on the Respondents in compliance with Rule 28.3 by sending 3 copies by Certified Mail, Return Receipt Requested, postage prepaid, to the Attorney General of Texas, P.O. Box 12548, Austin, Texas 78711-2548. All parties required to be served have been served.

Arthur E. Postel
ARTHUR E. POSTEL

SUBSCRIBED AND SWORN to before me by the said ARTHUR E. POSTEL, on this the 17 day of July, 1987.

Lynda Hubbard
LYNDA HUBBARD
Notary Public, State of Texas
My commission expires 11/18/88

APPENDICES

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ARTHUR E. POSTEL, Plaintiff	*	
VS.	*	
	*	SA-85-CA-2596
THE TEXAS WATER DEVELOPMENT BOARD, THE ATTORNEY GENERAL OF TEXAS, AND THE STATE OF TEXAS, Defendants	*	

ORDER OF DISMISSAL
(Filed August 27, 1986)

On this day came on to be considered defendants' motion to dismiss, and plaintiff's response thereto. Because this motion and the Court's ruling are based upon the pleadings, there is no need for a hearing to obtain evidence and no need for oral argument. Plaintiff has sued the Texas Water Development Board (TWDB), the Texas Attorney General and the State of Texas for declaratory relief and damages. The complaint recites a history of events beginning in the 1960's. Without restating

the details, it appears that plaintiff is complaining of the actions of the TWDB and the Attorney General in their management and allocation of public finances. He alleges that defendants acted without and in contravention of state constitutional authority, and that their actions subverted the state constitution and thus the State's republican form of government. Article 4, section 4 of the United States Constitution provides that the United States shall guarantee to every State a republican form of government. Plaintiff predicates jurisdiction of his complaint on 28 U.S.C. Section 1331, stating that his action arises under the Guaranty Clause.

In Baker v. Carr, 369 U.S. 186, 218-224, 82 S.Ct. 691, 710-714, 7 L.Ed.2d 663 (1962), the Supreme Court cited Luther v. Borden, 48 U.S. (7 How.) 1, 12 L.Ed. 581 (1849) for the well-established rule that

Guaranty Clause claims involve political questions, and are nonjusticiable. Enforcement of the Guaranty Clause is for Congress, not the courts. Highland Farms Dairy v. Agnew, 300 U.S. 608, 612, 57 S.Ct. 549, 551, 81 L.Ed. 835 (1937). Ohio ex rel. Bryant v. Akron Park District, 281 U. S. 74, 79-80, 50 S.Ct. 228, 230, 74 L.Ed. 710 (1930). Davis v. Hildebrant, 241 U.S. 565, 569, 36 S.Ct. 708, 710, 60 L.Ed. 1172 (1916). Pacific States Telephone Co. v. Oregon, 223 U.S. 118, 32 S.Ct. 224, 56 L.Ed. 377 (1912). Hanson v. Town of Flower Mound, 679 F.2d 497, 502-503 (5th Cir. 1982). The Guaranty Clause is not a repository of judicially manageable standards which a court could utilize independently in order to identify a State's lawful government. Baker, at 223, 82 S.Ct. at 713.

Plaintiff attempts to distinguish the issues in this case as "financial questions" as opposed to "political ques-

tions"; the former, he claims, are justiciable. The fact of the matter is that questions concerning the right to a republican form of government inherently are political. "Guaranty Clause claims involve those elements which define a 'political question', and for that reason and no other, they are nonjusticiable." Id. at 218, 82 S.Ct. at 710. Since plaintiff has not invoked any substantive federal constitutional or statutory provision other than the Guaranty Clause,[1] and since this Court cannot adjudicate issues under that provision, plaintiff has failed to state a claim upon which relief can be granted. See, Baker, at 196, 198-204, 82 S.Ct. at 698-699, 700-703. See also, Hanson, at 503, n.8.

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[1] The Declaratory Judgment Act, Title 28 U.S.C. Sections 2201 and 2202, creates a remedy only and cannot be used to establish jurisdiction or a viable claim. Williams v. Woods, 612 F.2d 982, 984 n.1 (5th Cir. 1980).

It is, therefore, ORDERED that the above entitled and numbered cause be, and it hereby is, DISMISSED.

SIGNED this 26th day of August, 1986.

/S/ H.F. GARCIA
H.F. GARCIA
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-2745
Summary Calendar

ARTHUR E. POSTEL,

Plaintiff-Appellant,

v.

THE TEXAS WATER DEVELOPMENT BOARD, ETC., ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas
(SA-85-CA-2596)

(March 31, 1987)

Before RUBIN, RANDALL and HIGGINBOTHAM,
Circuit Judges.

PER CURIAM:*

---

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

The plaintiff below, Arthur E. Postel, appeals from the district court's dismissal of his suit against the Texas Water Development Board, the Attorney General of Texas and the State of Texas for failure to state a claim. Finding that the district court's dismissal was fully justified, we affirm.

I.

In 1969, Postel, then an employee under contract to the Franklin County Water District, wrote two letters to the editor in opposition to the adoption of two amendments to the Texas Constitution that would have raised the legal interest rate limitation on public bonds. In the instant complaint he alleges that, when the amendments were defeated by popular vote, members of the Texas Water Quality (Development) Board ("TWDB") maligned him for having expressed his opposition to them, excluded him from the public affairs of the

TWDB, and denounced him as having breached his contract with the Franklin County Water District. By these wrongful actions they subverted the democratic process and Postel's right to a republican form of state government.[1] Postel alleges that the official dishonesty he pointed out in his letters to the editor in 1969 continues to be manifested by actions of the TWDB and the Texas Attorney General. Specifically, since 1976 the defendants have attempted to violate the requirement of the Texas Constitution that general revenue funds

---

[1] Postel brought suit in the United States District Court for the Western District of Texas, under the Civil Rights Act, 42 U.S. C. Sections 1983, 1985(c), 1988 (1964), alleging that a conspiracy of the members of the TWDB and others to deprive him of his right to freedom of speech had resulted in his losing his contract with the Franklin County Water District. The district court entered summary judgment for the defendants. We held that the trial court did not err in concluding that there was no evidence of a conspiracy. Postel v. Franklin County Water Dist., 470 F.2d 189 (5th Cir. 1972).

used to pay principal and interest on Texas Water Development bonds be repaid and used to retire the bonds. Moreover, in helping build the Titus County Reservoir, the defendants have conspired to convert money from the state treasury to the private benefit of the Texas Utilities company. These actions have subverted the Texas constitution and the state's republican form of government, as guaranteed by the Guaranty Clause of the United States Constitution,[2] upon which Postel relied to his injury, as witnessed by his loss of earnings and concomitant debt. Postel alleges that, without declaratory relief, the imminent issuance of more TWD bonds will further subvert the state constitution and his right to live under a republican form of state government.

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[2] The Guaranty Clause provides, "The United States shall guarantee to every State in this Union a Republican Form of Government." U.S. Const. art. IV, sec. 4, cl. 1.

Postel brought suit pro se in the district court seeking to have the court compel the TWDB to adhere to the Texas constitution and to institute recovery of state funds converted to private corporate benefit. He also sought compensatory and exemplary damages for injuries to himself in the amount of $1,466,792.22, plus costs and attorneys' fees. Alternatively, he sought equitable relief, to be determined pursuant to a hearing under the Declaratory Judgment Act, 28 U.S.C. Section 2202. The district court dismissed the suit for failure to state a claim upon which relief can be granted, since Postel invoked only the Guaranty Clause, and the federal courts cannot adjudicate claims under that provision. Postel appealed.

II.

A complaint should be dismissed for failure to state a claim, as required by Fed. R. Civ. P. 12(b)(6) only if the plain-

tiff can establish no set of facts upon which relief can be granted. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). "(T)he Conley standard 'exhorts us to excuse mere artless drafting and to overlook superfluous argument in the interest of locating the substance of the pleader's claim.'" Jacquez v. Procunier, 801 F.2d 789, 791 (5th Cir. 1986) (quoting Jamieson By and Through Jamieson v. Shaw, 772 F.2d 1205, 1209 (5th Cir. 1985)). In a review of the district court's dismissal of a complaint for failure to state a claim, the allegations in the complaint must be taken as true. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); Rankin v. City of Wichita Falls, 762 F.2d 444, 446 (5th Cir. 1985). Claims presented under the Guaranty Clause, however, involve political questions and are therefore non-justiciable. Baker v. Carr, 369 U.S. 186,218-24 (1962); Hanson v. Town of Flower Mound, 679 F.2d 497, 502-03 (5th

Cir. 1982). "(T)he Guaranty Clause is not a repository of judicially manageable standards which a court could utilize independently in order to identify a State's lawful government." Baker, 369 U.S. at 223. Thus Postel could prove no set of facts upon which relief could be granted under the Guaranty Clause. Postel has invoked no constitutional or statutory provision other than the Guaranty Clause. This case must, therefore, be decided on the basis of the Guaranty Clause claim alone, and that claim must be dismissed. A dismissal for lack of a justiciable question under the Guaranty Clause is properly treated as a dismissal for failure to state a claim. Baker, 369 U.S. at 196; Hanson, 679 F.2d at 503 n.8. Therefore, we hold that the district court properly dismissed this action for failure to state a claim.

III.

Accordingly, the judgment of the district court is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-2745

ARTHUR E. POSTEL, Plaintiff-Appellant,

versus

THE TEXAS WATER DEVELOPMENT BOARD, Etc., ET AL., Defendants-Appellees.

Appeal from the United States District Court for the Western District of Texas

---

ON SUGGESTION FOR REHEARING EN BANC

Opinion 3-31-87, 5 cir.

(April 27, 1987)

Before RUBIN, RANDALL and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

(x) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/S/ CAROLYN DINEEN RANDALL
United States Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-2745
Summary Calendar

D.C. Docket No. SA-85-CA-2596

ARTHUR E. POSTEL,

Plaintiff-Appellant,

versus

THE TEXAS WATER DEVELOPMENT BOARD, Etc., ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas

Before RUBIN, RANDALL, and HIGGINBOTHAM,
Circuit Judges.

J U D G M E N T
(Filed: May 11, 1987)

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendants-appellees the costs on appeal, to be taxed by the Clerk of this Court.

March 31, 1987

ISSUED AS MANDATE: MAY 7, 1987

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-2745

ARTHUR E. POSTEL,

Plaintiff-Appellant,

versus

THE TEXAS WATER DEVELOPMENT BOARD, ETC., ET AL.,

Defendants-Appellees.

Appeal from the
United States District Court for the
Western District of Texas

(Filed June 22, 1987)

O R D E R:

IT IS ORDERED that the motion of appellant for recall of the mandate to prevent injustice in accordance with Local Rule 41.2 is denied.

/S/ CAROLYN DINEEN RANDALL
UNITED STATES CIRCUIT JUDGE

(2)

Supreme Court, U.S.
FILED
AUG 20 19[illegible]
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-128

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

ARTHUR E. POSTEL,

Petitioner,

v.

THE TEXAS WATER DEVELOPMENT BOARD, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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August, 1987

12pp

QUESTION PRESENTED

The Question for Review is whether Petitioner's case was properly dismissed for failure to state a claim upon which relief could be granted.

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No. 87-128

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

ARTHUR E. POSTEL,

Petitioner,

v.

THE TEXAS WATER DEVELOPMENT BOARD, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This case represents Petitioner's third unsuccessful attempt to recover for what he alleges was Respondents' "official malignment" of him and their purported violations of the Texas Constitution in the manner in which the Texas Water Development Fund is administered. His first such suit was filed in 1970 and resulted in the United States District Court's dismissal of Respondent Texas Water Development Board for lack of jurisdiction and the granting of summary judgment in favor of its members and employees. That decision was affirmed by the United States Court of Appeals for the Fifth Circuit in 1973. *Postel v. Franklin County Water District, et al.*, 470 F.2d 189 (5th Cir. 1972). Later that same year, Petitioner filed suit in the District Court of Travis County, Texas against, *inter alia*, the individual members of the Texas Water Development Board. Petitioner non-suited that action in 1974.

The basis of the previous lawsuits and the present action are the same. Petitioner continues to allege that *in 1969* members

of the Texas Water Development Board conspired and maligned him for expressing his opposition to the then-proposed Texas Water Plan, an opposition based upon what he continues to allege is the extra-constitutional manner in which the Texas Water Development Board administers the Water Development Fund. The only differences between this and the previous lawsuits are the substitution of the Attorney General of Texas for the Franklin County Water District in the role of co-conspirator and the substitution of the Guaranty Clause for the First Amendment as the legal basis for the suit.

The end result of this lawsuit before the District Court was also the same as the others: Petitioner lost. Since he grounded this lawsuit solely on the Guaranty Clause, the District Court dismissed for failure to state a claim upon which relief could be granted.[1] The United States Court of Appeals for the Fifth Circuit affirmed the District Court's dismissal and rationale in an unpublished opinion. Petitioner now seeks this Court's review of that decision.

SUMMARY OF ARGUMENT

No writ should be granted because this case does not merit Supreme Court review. The Fifth Circuit ruled correctly in affirming the District Court. This Court has long and wisely held that claims under the Guaranty Clause are nonjusticiable.

REASONS THE WRIT SHOULD BE DENIED

I. The writ should be denied because this is not a special or important case.

First and foremost among the several reasons why the petition should be denied is that there are no special and important reasons for granting it. The decisions of the courts below fit none of the measures of character set out in Sup. Ct. R. 17.1. It is worth noting that neither the District Court nor the Court of Appeals viewed this case as worthy of publication. The im-

1. Also pending at the time of dismissal was Defendant's Motion to Dismiss for Want of Subject Matter Jurisdiction and Motion for Summary Judgment. Should a writ be granted in this case, Respondents would urge affirmance on the alternative grounds raised therein.

port of the Court of Appeals' determination not to publish its opinion is that it not only has no precedential value and merely settles a particular case on the basis of well-settled principles of law, but also that publication imposes needless expense on the public and burdens on the legal profession. 5th Cir. Loc. R. 47.5. Other indicia of lack of special or important reasons for granting certiorari in this case include its placement on the summary calendar without oral argument and the issuance of a per curiam opinion from a distinguished panel. 5th Cir. Loc. R. 34.2.

II. The writ should be denied because Petitioner failed to state a claim upon which relief could be granted.

In bringing his suit it appears that Petitioner has attempted to put into action an idea proposed by a student note in the Yale Law Journal. Note, *The Rule of Law and the States: A New Interpretation of the Guarantee Clause*, 93 Yale L.J. 561 (1984). That note argues for federal judicial review of the conformance of state officials to state law under the Guaranty Clause, U.S. CONST. art. IV, §4, as a measure to "secure the 'rule of law'." *Id.* Both as a matter of legal precedent and as unwise legal policy, that notion should be rejected.

A. Years of legal precedent indicate that no cause of action exists under the Guaranty Clause.

The issue of the existence of a cause of action under the Guaranty Clause is not new, and both Petitioner's brief and the note which sparked it recognize that no court has yet held that such a cause of action exists. (Petition, pp. 16-26; note, 93 Yale L.J. at 562.) What Petitioner characterized as a "judicial myth" is in fact a long and unbroken line of Supreme Court cases extending back to 1849 and the decision in *Luther v. Borden*, 7 How. 1 (1849). *See Baker v. Carr*, 369 U.S. 186, 218-226 (1962) (collecting cases).

Petitioner's attempts to distinguish his claim from those earlier cases and to craft an exception out of the political question analysis of *Baker v. Carr*, 369 U.S. 186, are of no avail. The criteria and formulations Petitioner lifts from *Baker*, 369 U.S. at 217, are those describing "political questions" in a context other than Guaranty Clause claims. *Baker* analyzed Guaranty

Clause claims separately from other "political questions," *Id.* at 218-226, and held that although none of the formulations describing political questions was present in that case, any Guaranty Clause claims would have been futile. *Id.* at 227. *Baker* recognized that "the Court has consistently held that a challenge to state action based on the Guaranty Clause presents no justiciable question." *Id.* at 224.

The first case cited by the Court in *Baker* for the proposition that the Guaranty Clause is not the source of a constitutional standard for invalidating state action is *Taylor v. Beckham*, 178 U.S. 548 (1900). That case sought Supreme Court review of a contested election in Kentucky, arguing that the actions of the Kentucky legislature (and courts) in resolving an election contest violated its constitution and thus deprived the petitioners of a republican form of government. The Court refused to consider the Guaranty Clause claims, holding them nonjusticiable. *Id.* at 580.

Petitioner is seeking to do that which is foreclosed by those cases. As in *Taylor*, he wishes a federal court to review the activities of a state government for conformity with its own constitution, arguing that its failure to do so violates his right to a republican government. His case is exactly what *Baker* recognized as nonjusticiable — a challenge to state action based on the Guaranty Clause. Those challenges were rejected long ago, and Petitioner has demonstrated neither cases nor rationale for overruling that line of cases.

B. Wisdom also dictates that no cause of action exists under the Guaranty Clause.

Those cases which have held that no cause of action exists under the Guaranty Clause are not only supported by *stare decisis* and the judicial wisdom set out in those decisions, but their outcome is also dictated by other judicial policies. The policies reflected in the Eleventh Amendment, in the concept of "our federalism," and the doctrine of abstention, all support the underlying notion that the states, as sovereigns, are the best arbiters of their own laws and constitutions.

Petitioner's argued-for Guaranty Clause cause of action would stand federal-state relations, developed over the 200 years of American constitutional history, on their heads and impose federal judicial review of all state action for conformity with state constitutional law. Despite his disclaimers to the contrary, it is an attempt to bootstrap state law violations into federal constitutional claims.

Guaranty Clause claims are and should be nonjusticiable because there is no federal standard by which conformity to the provision can be judged. This is best illustrated by Petitioner's proposed *per se* standard. Whether called "abrogation" or "outlaw government," it concerns state law and nothing more. It cannot be a federal standard for determining whether the Clause has been violated because its parameters are controlled solely by the state, and those parameters can be as easily changed by conforming state law to state conduct (i.e., amending the state constitution) as by conforming state conduct to state law. In either case, the state action remains the same, yet Petitioner would contend that one violates the federal standard while the other does not.

Creation of a federal judicial standard for determining conformity with the Guaranty Clause is equally unpalatable. It could stifle the states' traditional role as the "laboratories of democracy" and impose a federal straitjacket over the diverse forms of state government. While the judiciary have historically fashioned constitutional standards for due process and equal protection, it has always been a function of the legislative branches or the people themselves to determine what particular forms their republican governments take.

Because federal judicial review would arise at the district court level, that review would be *de novo* and, as easily as not, independent of and unguided by any determination by the courts of the state whose constitution was allegedly violated. This idea runs smack into the jurisdictional bar of the Eleventh Amendment and this Court's recent ruling that the amendment precludes federal courts from granting relief against state defendants based on pendent state law claims. *Pennhurst State School and Hospital v. Halderman (Pennhurst II)*, 465 U.S. 89 (1984). It is impossible to reconcile denying federal courts

jurisdiction to consider and grant relief for state law violations appended to properly raised federal claims with granting them that same jurisdiction when Guaranty Clause claims are raised.

Creation of a Guaranty Clause cause of action is unnecessary and is also insulting to the judiciary of Texas. Texas has courts and it has judges. Those judges take an oath to defend the Constitution of the United States and the Constitution of the State of Texas. TEX.CONST. art. XVI, §1. These courts were created by the very constitution Petitioner alleges is being subverted and possess the powers thought necessary by the people of Texas to protect themselves against such subversion. Just as this Court has recognized that it is denigrating to assume that state court judges would ignore the supreme law of the land, *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 243 n. 3 (1985), it is even more denigrating to assume that they would ignore the very law which has created them. If Texas officials are violating the Texas Constitution, that is a matter for Texas to deal with. How, or even if, they are dealt with is not a matter for the federal judiciary. See *Taylor v. Beckham*, 20 S.Ct. at 902.

CONCLUSION

Because this case lacks any important issues for review but instead applied long and well-settled principles of constitutional law, the writ should be denied.

Respectfully submitted,

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NO. 87-128

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

ARTHUR E. POSTEL,

Petitioner,

VS.

THE TEXAS WATER DEVELOPMENT BOARD,
THE ATTORNEY GENERAL OF TEXAS, AND
THE STATE OF TEXAS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY BRIEF

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September, 1987

RESPONDENTS PRESENT SUBSIDIARY QUESTION

The question presented by the Respondents can be deemed a subsidiary question fairly included within the question presented by the Petitioner.

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PETITIONER'S REPLY BRIEF

Pursuant to Rule 22.5 of this Court, your Petitioner respectfully submits this brief in reply to the arguments first raised in Respondents' Brief in Opposition. Citations to the original record (O.R.) are only to those of the Complaint as stated in the Petition, p. 5.

RESPONDENTS ERR IN STATING THE CASE

Respondents' history of prior suits has no relevance to the case at bar since they occurred prior to the adoption of House Concurrent Resolution No. 106 by which Petitioner was granted consent to sue the Respondents (O.R. 741). Without this consent of the State, the jurisdictional bar of the Eleventh Amendment was the rationale by which the court dismissed the Texas Water Development Board (TWDB) for lack of jurisdiction. This bar has now been removed, Restatement Second of Judgments, 1982, Section 26.

Respondents err in their attempt to cast conspiracy as a basis for the case at bar. Conspiracy is nowhere alleged.[1] Since the decisions in the previous federal case

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[1] The opinion below of the United States Court of Appeals for the Fifth Circuit is also in error by stating that "Postel alleges . . . the defendants have conspired" (Petition, pp. B-3,4).

held that there was no evidence of a conspiracy (Petition, p. B-3) and none is presently alleged, conspiracy is a dead issue. However, Respondents would revive this issue as an alternative ground for this Court's affirmance pursuant to the bar of collateral estoppel or issue preclusion.[2] (See Respondents' Brief, p. 2, n. 1)

Although Respondents would have this Court believe that Petitioner alleges he was maligned for expressing his opposition

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[2] Not only would collateral estoppel fail as a bar, but Respondents' other alternative grounds of res judicata and limitation would also fail because the previous dismissal of the TWDB for lack of jurisdiction is an exception to claim preclusion, Restatement Second of Judgments, 1982, Section 20; and limitation tolls. Furthermore, the prosecutorial immunity claimed for the Attorney General has been specifically forgone by H.C.R. No. 106. Abstention is not warranted under the Pullman doctrine because there is warrant in state law for Respondents' actions (which abrogate the Texas Constitution), and Burford-type abstention is not available because the criteria for equitable discretion are wanting -- both more fully developed in Petitioner's reply brief below.

to the Texas Water Plan, in truth he alleges that he was maligned for expressing his opposition to proposed amendments to the Texas Constitution that would have implemented the Plan (O.R. 646-47, 734-36bis). That opposition, Respondents concede, was based upon what he continues to allege is the extraconstitutional manner in which the TWDB administers the Water Development Fund -- an allegation that "must be taken as true" by a court in its review, Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), and one among others that tolls limitation.

RESPONDENTS' SUMMARY OF ARGUMENT IS NOT SINCERE

As an attorney for Respondents, the Attorney General of Texas, a Respondent in his official capacity, argues not from conviction but only for convenience that "claims under the Guaranty Clause are nonjusticiable". In State of Texas v. United States, 730 F.2d 339, 358 (5th Cir. 1984),

this same Attorney General devoted 30% of his brief to the justiciability of his claim that the Staggers Act violates the Guaranty Clause. Petitioner moved to incorporate this brief on former appeal under FRAP Loc.R. 27.1.10, but it was denied in error as a motion to supplement the record under Loc.R. 27.1.8. Certainly, the "highly imaginative" argument, Id., at 358 of this brief is not that of Petitioner, but it argues the justiciability of the Guaranty Clause, and now the Attorney General would foreclose Petitioner with his inconsistency and the error below.

I THERE ARE SPECIAL AND IMPORTANT REASONS FOR GRANTING THE WRIT

Respondents contend that there are no special and important reasons for granting the petition for a writ of certiorari because the "decisions of the courts below fit none of the measures of character set out in Sup. Ct. R. 17.1". While this rule

provides that these measures of character neither control nor fully measure this Court's discretion, it should be noted that the decisions below did not address the abrogation of the Constitution of the State of Texas -- the sine qua non to the question presented in the Petition, to the issues presented in the briefs below and in the Complaint (O.R. 642,643,659-663,673, 673bis,684-685bis,686-690). Under Sup. Ct. R. 17.1(c), this question is "an important question of federal law (integral to the Guaranty Clause) which has not been, but should be, settled by this Court".

The question is without judicial precedent (Petition, pp. 13-14), so the courts below had no guidance by which to uphold the constitutional and republican form of state government that the Respondents are subverting with their abrogation of the Texas Constitution (Petition, pp. 5-12). With no other responsible federal

authority to uphold the republican form of state government in Texas (Petition, pp. 12-13), the federal question is substantial for the federal courts in that it is "the obligation of the United States" and "the duty of the United States" to guarantee a republican form of government to the people of Texas, Texas v. White, 74 U.S. 700, 727-729 (1868).

Respondents view the lower courts' mode of handling the case as other "indicia of lack of special or important reasons for granting certiorari" (p. 3). This view has no relevance to the grant of certiorari because the lower courts mode of handling the case was circumscribed by the precedent of previous Guaranty Clause claims and the lack of precedent when confronted with such claims based on constitutional abrogation.

The question presented in the Petition is integral to the responsibility of

the federal courts under the Guaranty Clause. It has not been settled, but it should be settled by this Court. Therefore, there are special and important reasons for granting the writ of certiorari.

II RESPONDENTS DISSEMBLE BY FALSE REPRESENTATION

Respondent Attorney General of Texas again dissembles his own convictions about the Guaranty Clause (pp. 4-5 supra) by the false representation that a student note sparked Petitioner's suit. It is an existing fact that Petitioner made a one line reference to this note in a brief below, but there is no evidence that it sparked his suit; whereas there is considerable evidence that the abrogation of the Texas Constitution continues and prompted his opposition to the adoption of proposed constitutional amendments for which he was subjected to an official state governmental attack which maligned and injured.

These are the facts which "sparked" this suit, and not the Attorney General's false representation which is merely calculated to deceive.

II-A THE CURRENCY OF THE "JUDICIAL MYTH"

Respondents fail to recognize that the "judicial myth" is not the "long and unbroken line of Supreme Court cases extending back to 1849 and the decision in Luther v. Borden, 7 How. 1 (1849)" (p. 3). Rather, it is the prevailing false notion, held uncritically by the legal profession, that the adjudication of those claims has been converted into an immutable holding that the Guaranty Clause itself has an intrinsic, nonjusticiable, political question bias. Since this Court has not so held nor could it so hold because the future cannot be foretold, the currency of this bias is a "judicial myth".

Respondents err by stating that Peti-

tioner "lifts from Baker, 369 U.S. at 217" (p. 3) criteria other than those derived from analyses of Guaranty Clause claims. Baker v. Carr analyses of Guaranty Clause claims, Id. at 218-226, are fully examined in the Petition, pp. 21-26, and the case of Taylor & Marshall v. Beckham, 178 U.S. 548 (1900), analyzed in Baker and again by the Respondents (p. 4), is shown to be one from which the case at bar is clearly distinguished (Petition, p. 26).

The cases collected in Baker have no precedential value for the suit at bar. Respondents' suggestion that they need to be overruled to grant the writ reflects the currency of the "judicial myth". These cases need not be overruled since they dealt not with constitutional abrogation, and because the instant case is clearly distinguished in all respects from that line of cases (See Petition, pp. 23-26).

II-B THE DICTATES OF WISDOM ARE OTHER THAN THOSE ADVANCED BY RESPONDENTS

1. States cannot always be their own best judge. Respondents advance the "notion that the states, as sovereigns, are the best arbiters of their own laws and constitutions" (p. 4). However, constitutions limit government as well as establish government (Complaint, O.R. 670), and expansion, not limitation, is their natural tendency. Although it must be taken as true that the TWDB has expanded outside the limits of the Texas Constitution and abrogated its provisions (Petition, pp. 5-12); no authority in Texas has enforced constitutional limits on this state agency. On the contrary, legislative, judicial and executive branches of Texas government have all accommodated the expansion of the TWDB outside the limits of the Texas Constitution (O.R. 642,643,652,657,659,661,662,664, 673bis,679,683bis,684-85,687-690,701,715).

Because the coordinate branches of the federal government take no hand in the matter (Petition, pp. 12-13), the federal courts and the Guaranty Clause are particularly well suited to meet the responsibility of the United States to uphold the republican form of state government in Texas. Extensive discovery has already produced the evidence by which Petitioner will be able to establish the truth of his allegations in Federal District Court.

2. Respondents' in terrorem argument (p. 5) that "Petitioner's argued-for Guaranty Clause cause of action would . . . impose federal judicial review of all state action for conformity with state constitutional law." is a non sequitur. The argument must presuppose the impossible condition that all state action would cause an alleged injury from constitutional abrogation for which redress would be sought in federal court. The argument has no merit.

3. Respondents err by refuting the control of the Texas Constitution over state conduct. Such an argument by the State would, if sustained, subvert its republican form of government.

In the United States, a universal standard of a republican form of state government is a written constitution as the foundation of that governmental form (Petition, pp. 29-30). Petitioner contends that the abrogation of the Constitution of the State of Texas subverts its republican form of government, violates that standard and thereby violates the Guaranty Clause. Respondents assert that such a standard:

> ". . cannot be a federal standard for determining whether the Clause has been violated because its parameters are controlled solely by the state, and those parameters can be as easily changed by conforming state law to state conduct (i.e., amending the state constitution) as by conforming state conduct to state law." (p.5)(emphasis supplied).

"In either case (Respondents continue),

the state action remains the same, yet Petitioner would contend that one violates the federal standard while the other does not." Petitioner does, indeed, so contend.

The Respondents have here capsuled the essence of the controversy by asserting, if effect, the legitimacy of constitutional abrogation (state conduct) because the state constitution can be amended to conform to state conduct. This argument is illimitable. If sustained, it would enable the State to run free of constitutional restraints and limitations. Even the defeat of a proposed constitutional amendment to legitimate state conduct would not alter illegitimate conduct as in the case at bar (O.R. 658,660-662,678bis, 686-690,701,704,706-713bis).

Since the State of Texas will not, and feels free not to, conform to the will of its voters as that will is democratically expressed in elections for the adop-

tion of amendments to its Constitution, a federal standard of constitutional conformity is essential for the United States to meet its responsibility under the Guaranty Clause. Because the coordinate branches will not act (Petition, pp. 12-13,30-31), this standard will enable this Court to meet the obligation and duty of the United States to guarantee a republican form of government to the people of Texas, Texas v. White, 74 U.S. 700, 727-729.

Respondents contend that such a standard "could stifle the states' traditional role as the 'laboratories of democracy' and impose a federal straitjacket over the diverse forms of state government" (p. 5). Petitioner contends that the state's role, in its attack on Petitioner and in subverting the will of the voters (pp. O.R. supra), has been antagonistic to democracy; and the Texas Legislature itself has found that the role played by Respondent

TWDB "is abhorrent to the democratic process", H.C.R. No. 106 (O.R. 741).

Furthermore, a federal standard of constitutional conformity would not inhibit "the legislative branches of the people themselves to determine what particular forms their republican governments take.", as Respondents contend (p. 5), because such a standard would look only to the conduct of that government.

4. Respondents err by resurrecting the bar of the Eleventh Amendment so as to assert a bar against noninvolved pendent jurisdiction. They assert that it would be impossible to reconcile federal jurisdiction for Guaranty Clause claims with the Eleventh Amendment's bar "for state law violations appended to properly raised federal claims" (p. 6) as this Court held in Pennhurst State School and Hospital v. Halderman (Pennhurst II), 465 U.S. 89 (1984). It is, of course, a fact that the

case at bar involves no pendent jurisdiction, and the Eleventh Amendment bar has been foregone by H.C.R. No. 106 (pp. 2,3 supra), but more to Respondents' point is the fact that jurisdiction under the Guaranty Clause goes to the abrogation of a state's constitution, the very foundation of its republican form of government, and the ruling in Pennhurst concerns only state law violations. This is not to disparage state law but to highlight the integral and fundamental role of a state's constitution in its republican form of government; and, as such, the inseparability of fidelity to a state's constitution and the guaranty of republican government in the United States Constitution.

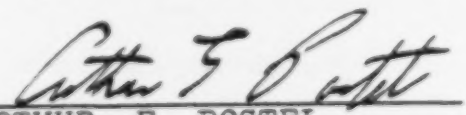
5. Respondents' feigned umbrage that "a Guaranty Clause cause of action is unnecessary and is also insulting to the judiciary of Texas"(p.6) merely dissembles the reality of power in Texas. That power, or

"faction" to use Madison's term (Petition, p.34), has its interests served by water development, and will abrogate the Texas Constitution to serve that end. Given this "faction", it is beyond reason to expect that a state court could supply relief.

CONCLUSION

Respondents abrogate the Texas Constitution, grant themselves that right (pp.13-14 supra), and reserve the right to do nothing about it (Brief, p.6). Such abrogation clearly subverts the republican form of Texas government, and violates the Guaranty Clause. Because the issues are important and without precedent, the Petition should be granted.

Respectfully submitted,



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AFFIDAVIT OF SERVICE

The State of Texas §
§
County of Bexar §

Before me, the undersigned Notary Public in and for Bexar County, Texas, on this day personally appeared ARTHUR E. POSTEL, who being by me duly sworn, upon oath stated: I, ARTHUR E. POSTEL, am the Petitioner herein, and on the 17th day of September, 1987, I served copies of the foregoing Petitioner's Reply Brief on the Respondents in compliance with Rule 28.3 by sending 3 copies by Certified Mail, Return Receipt Requested, postage prepaid, to the Attorney General of Texas, P.O. Box 12548, Austin, Texas 78711-2548. All parties required to be served have been served.

Arthur E. Postel
ARTHUR E. POSTEL

SUBSCRIBED AND SWORN to before me by the said ARTHUR E. POSTEL, on this the 17 day of September, 1987.

Lynda Hubbard
LYNDA HUBBARD
Notary Public, State of Texas
My commission expires 11/18/88